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TRAFFICSCHOOL.COM, INC. and
8 DRIVERS ED DIRECT, LLC, California companies.

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 TRAFFICSCHOOL.COM, INC.,
a California corporation; DRIVERS ED
13 DIRECT, LLC, a California limited
liability company,

14 Plaintiffs,

15 vs.

16 EDRIVER, INC., a California
17 corporation; ONLINE GURU, INC.,
FIND MY SPECIALIST, INC., and
18 SERIOUSNET, INC., California
corporations; RAVI K. LAHOTI, an
19 individual; RAJ LAHOTI, an individual;
and DOES 1 through 10,

20 Defendants.
21

Case No. CV 06-7561 PA (CWx)

The Honorable Percy Anderson

**PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' INITIAL AND
SECOND REQUESTS FOR JUDICIAL
NOTICE**

Date: Nov. 6, 2007
Crtm.: 15

1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 Pursuant to Rule 201 of the Federal Rules of Evidence, Plaintiffs
3 TRAFFICSCHOOL.COM, INC. and DRIVERS ED DIRECT, LLC., (“Plaintiffs”)
4 hereby submit this request for an opportunity to be heard on the “propriety of taking
5 judicial notice and the tenor of the matter noticed” of the topics in Defendants’
6 Request for Judicial Notice for Trial *and* Defendants’ Second Request for Judicial
7 Notice for Trial.

8 Defendants have the burden of proving that the fact matters sought to be
9 proved by judicial notice (facts relating the parties, their properties, their actions,
10 etc., which would be the subject of proof) are *not reasonably disputable*. FRE 201
11 (a); See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347-348 (5th Cir.
12 1982).

13 Moreover, the matter to be judicially noticed must be *relevant* to the issues in
14 the case. FRE 402; See, e.g., Latino Food Marketers, LLC v. Ole Mexican Foods,
15 Inc. (7th Cir. 2005), 407 F.3d 876, 881 (court did not err in refusing to take judicial
16 notice of FDA standards for impeachment purposes when defendant never claimed
17 its products met standards).

18 Specifically, Plaintiffs object as follows:

19 **Item No. 1:**

20 Defendants’ misquote from a portion of argument from Plaintiffs’
21 Memorandum in Support of Motion for Summary Judgment in which Plaintiffs
22 argued: “Defendants have changed their website numerous times over the past
23 several years, progressing from a simple and non-offensive website to an actionable
24 one in late 2006.” (Def. Req. Exhibit 1, pg. 3).

25 From that, Defendants ask this Court to take judicial notice of the fact that
26 Plaintiffs’ have admitted “that the website was ‘non-offensive’ and not ‘actionable’
27 prior to late 2006.”

28 This grossly misstates Plaintiffs’ statement and is hereby *disputed*. The only

1 undisputed matter is that Plaintiffs stated the website was indeed an “actionable one
2 in late 2006” (and thus why Plaintiffs filed suit then). Plaintiffs only meant that from
3 2002 to before filing suit, the website progressed “from a simple and non-offensive
4 website” *in* 2002 to one alleged to be actionable when Plaintiffs filed suit in late
5 2006. *Nothing is otherwise admitted or stated about the website from its inception in*
6 *2002 until 2006.*

7 Accordingly, the requested fact for judicial notice is also *irrelevant* for the
8 reasons submitted by Defendants.

9 **Item No. 2:**

10 Again, Defendants’ misquote from a portion of argument from Plaintiffs’
11 Opposition to Defendants’ Motion for Summary Judgment in which Plaintiffs
12 argued, in part, that the “Site as it existed in 2002 and 2003 was fundamentally
13 different (and not misleading) from what it was like at the time the lawsuit was
14 filed.” (Def. Req. Exhibit 2, pg. 5).

15 From that, Defendants ask this Court to take judicial notice of the fact that
16 Plaintiffs’ have admitted “that the website was ‘not misleading’ prior to late 2006.

17 Again, this is inaccurate and is hereby *disputed*, as the only undisputed item is
18 that Plaintiffs stated the Site in 2002 and 2003 was not misleading. Plaintiffs never
19 stated that the site was “not misleading” *prior to late 2006.*

20 Accordingly, the requested fact for judicial notice is also *irrelevant* for the
21 reasons submitted by Defendants.

22 **Item No. 3:**

23 In this Item, the Court is asked to take judicial notice of numerous facts of an
24 FTC case that is *unrelated and irrelevant for purposes of the precise issues in this*
25 *case.* That FTC matter was apparently resolved by *settlement* between the FTC and
26 Consumerinfo.com. (Def. Req. Ex. 3, pg. 8 “Note: A stipulated final judgment and
27 order is for settlement purposes only...”). That case (of which a copy of the
28 complaint is *not* attached), likely implicated FTC regulations not alleged in *this* case,

1 and apparently dealt with consumer rights under the “Fair Credit Reporting Act and
2 the FACT Act” (*Id.*), both *not* at issue in this case. See, e.g., Latino Food Marketers,
3 LLC v. Ole Mexican Foods, Inc. (7th Cir. 2005), 407 F.3d 876, 881 (court did not err
4 in refusing to take judicial notice of FDA standards for impeachment purposes when
5 defendant never claimed its products met standards).

6 Thus, these facts cannot support Defendants’ relevance argument that
7 “DMV.ORG’s disclosures both pre-and post-litigation meet or exceed the terms
8 agreed to by the FTC.”

9 **Item No. 4:**

10 In this Item, Defendants ask the Court to take judicial notice of the
11 “availability of .ORG domain registrations” because the website confirms that .ORG
12 is an “open” and “unrestricted” domain.

13 Whether the .ORG domain *can* be registered by anyone is *not relevant* to the
14 issue in this case, which is whether the DMV.ORG brand in the context of
15 Defendants’ search engine and website advertising is false or misleading *to*
16 *consumers*. Moreover, the Exhibit itself states that .ORG is “primarily is used by
17 *noncommercial* entities around the world” (Def. Req. Ex. 4, pg. 15). Unless
18 Defendants are willing to agree that .ORG signifies to consumers a *noncommercial*
19 entity, what “PIR” says “About .ORG” is a matter that is not appropriate for judicial
20 notice in this case.

21 **Item No. 5:**

22 In this Item, Defendants again ask the Court to take judicial notice of “the
23 rules re restricted availability of .GOV domain registrations.” This is *irrelevant* to
24 this case.

25 Whether the .GOV domain can only be registered by government agencies
26 does not prove that consumers know this, or that consumers think that every state
27 DMV website must be a .GOV domain. Indeed, North Carolina’s DMV *can be found*
28 *at a .ORG domain* (ncdot.org, not a .gov domain), showing that governments are

1 clearly *not restricted to the use of .GOV domains*.

2 **Item No. 6:**

3 In this Item, Defendants appear to be asking the Court to take judicial notice of
4 an undated report (but referencing dates from 2004). The study is old, not clearly
5 dated; lacking in foundation, and incomplete (Were other studies done? What about
6 the reports for this year? What is the “California Portal” it mentions?). Moreover,
7 there is no evidence that there is any “agency action” related to this report, as
8 Defendants claim by arguing “judicial notice of agency action may be proper...”.

9 Moreover, these are not “adjudicative facts” that go to any relevant issue.
10 Defendants’ claim that they are relevant to “establish why there is a market for
11 private information on how to deal with the state motor vehicle departments” is not
12 well taken; no one disputes that there is market for such information – only that
13 DMV.ORG does not operate in that market in a fair way.

14 **Item No. 7:**

15 The California Legislative Analyst’s Office report in February 2004 are not
16 “adjudicative facts” that go to any relevant issue in this case. Defendants’ claim that
17 they are relevant to “establish why there is a market for private information on how
18 to deal with the state motor vehicle departments” is not well taken. Again, no one
19 disputes that there is market for such information – only that DMV.ORG does not
20 operate in the market in a fair way. This document is also not up to date (i.e., 2004).

21 **Item No. 8:**

22 Portions of the file history of the state of California’s trademark application
23 should be excluded as *irrelevant to the issues in this case*. For purposes of a federal
24 registration, the fact that CA DMV had to disclaim DMV only shows the well-settled
25 principle of trademark law that trademarks have geographic limitations that are
26 dictated by the reach of the trademark’s use. In other words, DMV is proprietary to
27 CA in this state, but would not be proprietary to the state of California in other states,
28 because other states also have DMVs, and thus had to limit its *federal* registration

1 accordingly.

2 **Item No. 9:**

3 Same as above.

4 **Item No. 10:**

5 This Item (counsel prepared chart) lacks foundation and is incomplete, is
6 disputed, and is irrelevant for purposes of a determination of how consumers
7 perceive DMV.ORG. Indeed, Plaintiffs' Trial Exhibit 400 shows a collection of
8 consumer emails to the DMV.ORG website from consumers living in "non-DMV"
9 states (i.e., those states that do not necessary use DMV for their agency name) that
10 *still use the term DMV to refer to that state's agency*. Plaintiffs' Trial Exhibit 401
11 shows DMV.ORG's ads that target consumers from non-DMV states by using those
12 state's agency acronyms or similar indicia in the DMV.ORG advertisement. Thus,
13 these issues are disputed and not subject to judicial notice.

14 **Item No. 11:**

15 This item is irrelevant, as it a third party site not at issue in this case.

16 **Item No. 12:**

17 Same as above.

18 **Item No. 13:**

19 Same as above.

20 **Item No. 14:** [From Defendants' Second Request]

21 This item is irrelevant. Defendants' incorrectly assert that "Damages, if any,
22 should be limited to in these states, accordingly." However, Plaintiffs monetary relief
23 is not based on a damage model; but rather Defendants' *gross profits*. As stated in
24 the Joint Stipulation of the Parties Regarding Plaintiffs' Motion to Compel the
25 Production of Documents [by Defendants]:

26 "It is Ninth Circuit law that "[a] plaintiff who
27 successfully establishes a violation of § 43(a) is entitled to
28 recover, "subject to the principles of equity, ... (1)

1 *defendant's profits*, (2) any damages sustained by the
2 plaintiff, *and* (3) the costs of the action.” 15 U.S.C. §
3 1117(a)... the preferred approach allows the district court in
4 its discretion to fashion relief, including monetary relief,
5 *based on the totality of the circumstances.*” [Southland Sod
6 Farms v. Stover Seed Co., 108 F.3d 1134, *1139 (9th Cir.
7 1997), *emphasis added*].

8 According, Defendants’ profits related to DMV.ORG
9 are relevant in this action. Moreover, Plaintiffs are entitled
10 to discover *all gross profits attributable to the*
11 *misrepresentations of DMV.ORG*, which means all the
12 profits derived from the operation of DMV.ORG, not just
13 Defendants’ traffic school and drivers education related
14 revenues. “In assessing profits the plaintiff shall be
15 required to prove defendant’s sales only. . .” 15 U.S.C. §
16 1117(a) .

17

18 Next, the “totality of circumstances” approach to
19 remedies mandated by the Ninth Circuit encompasses
20 Plaintiffs’ demand for Defendants’ *advertising costs* related
21 to DMV.ORG. Indeed, the Ninth Circuit has affirmed
22 monetary awards based on the *defendant’s costs of*
23 *advertising*. See, e.g., U-Haul Intern., Inc. v. Jartran, Inc.,
24 793 F.2d 1034, *1042 (9th Cir. 1986)(affirming district
25 court’s inclusion of the \$6 million cost of its advertising
26 campaign as “profits” within the meaning of Lanham Act §
27 35, noting that “the district court assumed that the financial
28 benefit [to the defendant] was at least equal to the

1 advertising expenditures.”).

2 It is axiomatic, therefore, that in order for the Court
3 to fashion relief based on “defendant’s profits” (including
4 by measurement of Defendants’ advertising costs),
5 Plaintiffs must necessarily be provided in discovery with
6 information related to Defendants’ profits and advertising
7 costs for DMV.ORG since its inception to the present. ..”

8 **Item No. 15:** [From Defendants’ Second Request]

9 This item is irrelevant, as it a third party site not at issue in this case.

10
11 DATED: November 6, 2007

LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13 By Mina I. Hamilton

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PROOF OF SERVICE

Trafficschool.com, Inc. v. Edriver, Inc. - File No. 25162.14

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 221 N. Figueroa Street, Suite 1200, Los Angeles, California, 90012.

On November 7, 2007, I served the following document described as **PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INITIAL AND SECOND REQUESTS FOR JUDICIAL NOTICE** on all interested parties in this action by providing ☒ a true copy by hand delivery to:

Brian M. Daucher, Esq.
Joseph H. Tadros, Esq.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 7, 2007 at Los Angeles, California.


MINA HAMILTON